STATE OF MICHIGAN

COURT OF APPEALS

TECHNOLOGY RECYCLING CORP, Plaintiff-Appellee/Cross-Appellant,	UNPUBLISHED June 12, 2003
v	No. 231312 Wayne Circuit Court
WOODWARD-MANCHESTER CORP, Defendant-Appellant/Cross-Appellee.	LC No. 96-691240-NZ

Before: Whitbeck, C.J., and Fitzgerald and Zahra, JJ.

PER CURIAM.

Defendant Woodward-Manchester Corporation appeals as of right the reinstatement of a $1.9 million exemplary damage award in favor of plaintiff Technology Recycling Corporation (also known as Eclipse Technology). Technology cross-appeals, arguing that the trial court erroneously limited the availability of compensatory damages. This case arose when Woodward-Manchester employees moved and damaged a significant amount of used electronic equipment that Technology, Woodward-Manchester's tenant, was preparing for resale. We reverse and remand for a new trial limited to the issue of damages.

I. Basic Facts And Procedural History

A. Factual Background

In October of 1995, Technology entered into a contract with Ford Motor Company to purchase and recycle or resell some of Ford's used electronic equipment. The agreement specified that Technology would pay Ford eight cents a pound up front for the equipment, and eighteen percent of any eventual profit Technology earned from the sale of the equipment, calculated annually. Technology's president, Richard Drummond, estimated that eighty percent of the equipment, such as computer hard drives and memory, could be resold; Technology would then sell the salvaged parts and reclaimed metals from the remaining twenty percent. Ford had much this equipment in storage in the Six Story Building, part of a complex in Highland Park that was owned and operated by Woodward-Manchester.

To store this equipment while it was being processed for resale, Technology leased 25,500 square feet of space from Woodward-Manchester on the second floor of the H Building, which was connected by a bridge to the Six Story Building, for a two-year term beginning November 1, 1995. The lease also gave Technology the right to use the third floor of the H

building at no charge until eleven specified improvements to the second floor were completed. The lease further provided for reduced monthly rent until the building's elevator was activated.

In January, 1996, the repairs had not been completed and, as a result, Technology refused to pay the deposit or the monthly payments on the lease. To help resolve the problem, Roger Mullin, Ford's site manager at the Woodward-Manchester Complex from 1982 until he retired on June 1, 1996, intervened. On January 11, 1996, Mullin wrote a letter to Claude Auger, Woodward-Manchester's project administrator who oversaw daily operations at the complex, that established a timeline for repairs, to which Auger agreed. Although this apparently broke the impasse, Mullin characterized the relationship between Drummond and Auger as "spiteful." Auger acknowledged that not all the repairs were completed by the dates agreed upon; however, he attributed this to the fact that Technology would not move their equipment to allow the work to be done.

In July, 1996, Auger directed a work crew to consolidate Technology's equipment on the third floor into an area of approximately 10,000 square feet, despite the fact that the lease gave Technology the right to use the entire third floor. Auger testified that he thought the materials had the value of "junk" because everyone, including Ford employees, referred to it as "scrap," and some of it was labeled as such. According to Auger, the equipment was not neatly stacked, but was on the floor and disassembled. Auger further asserted that he had asked Technology employees three times whether there were any special handling instructions for the equipment, but claimed he was told only that it was scrap.

Mullin, who had become a consultant for Technology with a downstairs office in the H Building after retiring from Ford, heard forklifts driving back and forth across the third floor and decided to investigate. On arrival, he discovered Woodward-Manchester employees moving Technology's equipment to the north end of the third floor and "literally dumping it" from the forklifts in a careless manner that left him "horrified." Mullin vehemently denied telling Auger or anyone else that the equipment did not require special handling. Mullin explained that his staff had been trained to put the quality equipment on the third floor, and to store any damaged equipment in an outside storage area.

This was seconded by Nancy Henry, an administrative assistant in Ford's purchasing department, who explained that the equipment on the third floor was "in good condition, just outdated," and still had operational value. An attorney for Technology, Robert Akouri, had visited the H Building before and after the equipment was moved. Akouri stated that while the equipment on the third floor had been neatly packaged, shrink-wrapped, and set on pallets, after Woodward-Manchester moved it, it looked as though it had been bulldozed, leaving it "completely destroyed." Technology submitted photographs taken before and after Woodward-Manchester moved its equipment, as well as a videotape of the damage, that substantiated Akouri's characterization.

Mullin did not confront Auger about moving the equipment; however, he did notify Drummond. When Drummond came to the scene, he saw Woodward-Manchester employees allowing pallets of equipment to "fly right off the forklifts" rather than setting them down. Drummond testified that although Auger had notified him of his plans to move the equipment, Drummond had responded, "you move it, you bought it," and reminded Auger that Technology was entitled to be on the third floor under the terms of the lease.

Technology filed a three-count complaint on December 23, 1996, alleging that Woodward-Manchester's moving and damaging of Technology's materials constituted trespass, conversion, or gross negligence and willful and wanton misconduct.[1] The case went to a jury trial before Wayne Circuit Judge Dalton A. Roberson on August 2, 1999.

At trial, Drummond explained that Technology calculated its revenues on the equipment sales using a price to weight index ratio. In other words, a one-hundred pound item that sold for one hundred dollars would have a one to one ratio. According to Drummond, in 1995, the ratio on the Ford equipment was seven or eight to one, which meant that each pound was worth approximately eight dollars. The ratio declined somewhat in 1996. Although many of the records relating to the equipment on the third floor were destroyed when it was moved, based on Ford's preliminary shipping reports, Drummond estimated that Woodward-Manchester damaged between 1.3 and 1.4 million pounds of equipment. Drummond further estimated that, based on the amount of time it took to move a pallet of equipment times the weight of a typical pallet, the figure was closer to four million pounds.

John McCullogh, a certified public accountant, calculated Technology's total damages as $2,478,862, based on Drummond's estimate that 1.3 million pounds of equipment had been lost. This figure was derived from $2,430,053 in lost revenue and $48,809 in lost operating assets, taking into account Technology's expenses. McCullogh testified that Technology realized $6.03 in revenue for every pound of equipment in 1995, and $6.74 per pound in 1996. McCullogh estimated the salvage value, or net worth value, of the equipment at $1,754,812. McCullogh noted that timing of sales was crucial in respect to resale value, because the value of used computer equipment declined after 1996. McCullogh confirmed the existence and extent of the market for used electronic equipment by researching government shipping statistics and trade publications.

However, defense expert Rodney Crawford, a partner in the accounting firm Arthur Andersen, countered that there was no documentation to substantiate Drummond's estimate that there were 1.3 million pounds of equipment on the third floor and, moreover, that McCullogh's calculation of revenue per pound was based on a limited number of invoices that were unrepresentative of Technology's overall sales. Furthermore, having inspected the third floor in March, 1999, Crawford stated that some of the equipment appeared to be undamaged, and some of the equipment had already had valuable components removed, suggesting that Technology might have processed some of the equipment before it was damaged. Crawford asserted that the sales invoices he reviewed fell short of the sales figures in Technology's financial statements. Crawford also noted that Technology appeared to have made no effort to mitigate its damages.

In discussing how the jury would be instructed with respect to damages, Woodward-Manchester argued that Technology should not be awarded exemplary damages; however, the trial court agreed that exemplary damages would be available if the jury found Woodward-Manchester liable for gross negligence. Woodward-Manchester then objected that the proposed

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[1] After this suit was filed but before trial, Woodward-Manchester filed an eviction lawsuit which settled in March, 1997. The eviction suit and the subsequent settlement are unrelated to this appeal.

instruction defining exemplary damages was inadequate, and agreed to submit its own definition, although the trial court did not include it in the final instructions.

With respect to compensatory damages, Technology argued that the value of the equipment at the time of the conversion was the amount it agreed to pay Ford, namely, eight cents a pound plus eighteen percent of the profit. However, the trial court ruled that, because there was no evidence that Ford had been paid any of the profits at the time of the conversion, Technology was limited to damages of eight cents a pound. Throughout the discussion, Technology's attorney attempted to argue that lost profits, although unavailable in conversion actions, were available for gross negligence. However, the trial court responded, "[I]t's my feeling that because I have to give you exemplary damages as to gross negligence, you can't" recover lost profits. Accordingly, the trial court denied Technology's request to instruct the jury on lost profits.

At the close of evidence, the trial court granted Woodward-Manchester's motion for a directed verdict on the willful and wanton misconduct claim, but allowed the trespass, conversion, and gross negligence claims to be decided by the jury. The trial court instructed the jury to award only such damages as would reasonably compensate Technology for injuries proximately caused by Woodward-Manchester's conduct, and not to award damages to punish Woodward-Manchester. The trial court explained that "the amount should be measured by the fair market value and the exemplary damages," with the fair market value being measured by the difference in value before and after the damage occurred. The trial court then gave the following instructions regarding exemplary damages:

> Exemplary damages are recoverable under Michigan law if they're supported by the evidence in certain circumstances which I will now define for you. You may award the plaintiff exemplary damages to compensate the plaintiff for the aggrevating [sic] nature of the defendants [sic] conduct.
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> The law allows you to award exemplary damages if you find the defendant acted with gross negligence. Plaintiff even though a corporation may recover exemplary damages. The corporate defendant may be held liable for exemplary damages for injuries resulting in [sic: from] the conduct of its employee.
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> If you find from the evidence that the plaintiff is entitled to recover exemplary damages, you shall establish the amount of such damages as . . . that sum of money which is fairly and adequately compensate [sic] the plaintiff.

The jury found Woodward-Manchester not liable for trespass. However, the jury found Woodward-Manchester liable for conversion, for which it awarded $100,000 in damages. The jury also found Woodward-Manchester liable for gross negligence, for which it awarded $1.9 million in exemplary damages. As Technology points out, this amount corresponds roughly to its $2,430,053 in lost revenue as calculated by its expert, minus the eighteen percent it would have owed Ford under their contract.

B. Procedural Background

Woodward-Manchester moved for a new trial or remittitur on August 13, 1999. At the August 20, 1999 motion hearing, Woodward-Manchester argued that the exemplary damage verdict was grossly excessive or contrary to law because Technology had not suffered the type of injury for which exemplary damages are awarded and, even if it had, the $1.9 million amount was not supported by the evidence, particularly because the trial court had ruled that Technology could not recover lost profits. Woodward-Manchester also argued that the jury was improperly instructed with respect to exemplary damages. On August 24, 1999, which was after the hearing but before Judge Roberson's ruling, a judgment on the jury's verdict was entered. For reasons that are unclear, the parties did not become aware that a judgment had been entered until months later.

On September 3, 1999, Judge Roberson issued an opinion rejecting Woodward-Manchester's argument respecting the jury instructions, but holding that the exemplary damage award was excessive because the only evidence supporting it related to the equipment damage, which was precisely measurable. Furthermore, Judge Roberson noted that there was no evidence to indicate that Technology suffered the type of injury for which exemplary damages are awarded. Judge Roberson then issued an order granting Woodward-Manchester's motion for a new trial[2] unless Technology agreed to remit all but one dollar of the exemplary damage award. Judge Roberson retired the very day this order was entered. Thereafter, Technology refused the one-dollar remittitur.

On September 15, 1999, the case was reassigned to Wayne Circuit Judge Isidore Torres. After discussing the case with the attorneys and reviewing the file, but before reading the trial transcripts, Judge Torres held a hearing on November 8, 1999 to determine how to proceed with the case. Judge Torres was also under the mistaken impression that no judgment had been entered on the jury's verdict, leading him to comment that "this trial is still in progress" and "based on that I think I have greater latitude in terms of what I can do to resolve the issues here." Judge Torres observed that Judge Roberson's opinion was inconsistent with its accompanying order because the opinion stated there was no proof to support *any* exemplary damages, making even a nominal award erroneous. Because the evidence did not support a finding of exemplary damages, Judge Torres issued a ruling from the bench vacating the order granting a new trial under MCR 2.613(B), and also reducing the jury's exemplary damage award to zero.

However, Judge Torres held a second hearing on November 23, 1999 to determine whether, as successor judge, he had the authority to enter an order inconsistent with his predecessor's order. Technology argued that Judge Torres had only two options: either enter a judgment on the jury's verdict or retry, at the very least, the portion of the case relating to the gross negligence claim. Woodward-Manchester responded that Judge Torres had the authority to grant remittitur if there was a basis for a new trial. Although Woodward-Manchester observed that its motion for a new trial was deemed to include a motion for JNOV, Judge Torres refused to acknowledge that a motion for JNOV had effectively been made.

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[2] Although the order does not make this clear, Woodward-Manchester's motion was for a new trial on the exemplary damage issue only.

Judge Torres held that the record was insufficient to determine whether the evidence supported reading the instructions respecting exemplary damages, and questioned which of Judge Roberson's decisions carried more weight: the decision to instruct the jury on exemplary damages "when the whole issue was fresh in his mind in terms of the facts and everything else and the law," or his later decision that there was no basis for giving the instruction. Judge Torres stated that, in the absence of a motion for JNOV, his previous bench ruling was improper, and he therefore declared it "null and void." Judge Torres continued:

> Absent any legal authority I think my hands are tied and what I'm going to do now, from the definitive standpoint is to set aside the Judge's previous order. I'm going to deny the motion for a new trial and/or remittitur and enter a judgment in accordance with the jury verdict.

The docket sheet indicates that the submission of this judgment evidently led to the discovery that Judge Roberson had already entered a judgment on the jury verdict in August, 1999.

Thereafter, Woodward-Manchester moved for a new trial, remittitur, or JNOV, and also moved to reinstate Judge Roberson's opinion and order. At the June 28, 2000 hearing on these motions, Judge Torres discussed the discovery of the previously entered judgment on the jury verdict, and rejected the idea that his status as successor judge had any bearing on his authority to act in the case. Rather, Judge Torres posed the question whether the court could sua sponte amend or modify a previous order, and scheduled a hearing for arguments on that issue.

At the September 29, 2000 hearing, Technology argued that Judge Torres had the authority to amend or modify Judge Roberson's order for three reasons: first, the case was properly reassigned; second, Judge Torres had the specific authority to vacate his predecessor's order under MCR 2.613(B); and third, Judge Torres had the general authority to correct the consequences of error under MCR 1.105. Woodward-Manchester responded that Judge Torres could only vacate the order if it found that Judge Roberson had abused his discretion in granting a new trial or remittitur. Woodward-Manchester further argued that Judge Roberson's opinion and order were not inconsistent, and that it was entirely proper for Judge Roberson to change his mind with respect to whether exemplary damages were properly awarded, particularly because he had the benefit of post-trial briefing on the issue.

After hearing the arguments, Judge Torres again set aside Judge Roberson's September 3, 1999 order and reinstated the judgment on the jury verdict, explaining that he had the authority to do so under MCR 2.613(B) and applicable caselaw. This appeal and cross-appeal followed.

II. $1.9 Million Damage Award

A. Standard Of Review

Whether exemplary damages were properly awarded is a question of law that we therefore review de novo.[3]

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[3] *Burt Twp v Dep't of Natural Resources*, 459 Mich 659, 662-663; 593 NW2d 534 (1999).

B. Exemplary Damages

As a general matter, Michigan law permits a plaintiff to recover only compensatory damages, that is, those damages that "make an injured party whole for losses actually suffered."[4] Exemplary damages are a special class of compensatory damages that are available to compensate a plaintiff for non-economic damages inflicted by a defendant's conduct.[5] Specifically, exemplary damages are awarded to compensate a plaintiff for the "'humiliation, sense of outrage, and indignity' resulting from injuries 'maliciously, wilfully and wantonly' inflicted by the defendant."[6] In Michigan, exemplary damages are available only to compensate the plaintiff, not to punish the defendant.[7]

Under Michigan law, a corporation can be entitled to exemplary damages under certain circumstances. In *Joba Construction Co, Inc v Burns & Roe, Inc*,[8] this Court explained:

> Although it is true that, as a general rule, exemplary damages will not be awarded to compensate a purely pecuniary grievance susceptible to full and definite monetary compensation, . . . in the case at bar, the damage inflicted upon plaintiff was not susceptible to precise and definite measurement. In addition to suffering lost profits, which are inherently incapable of precise measurement, plaintiff may well have suffered injury to its reputation as a skillful and competent construction company.[9]

The Court went on to say that "[e]xemplary damages are awarded not only to compensate for injured feelings but also to compensate for injuries not capable of precise computation resulting from malicious conduct."[10]

However, as Woodward-Manchester points out, *Joba*'s precedential weight has been eroded because its holding was based in part on this Court's decision in *Hayes-Albion Corp v Kuberski*,[11] which the Michigan Supreme Court reversed in part after *Joba* was decided.[12] As the Supreme Court's decision made clear, an exemplary damage award will not be upheld if it could have been awarded as general compensatory damages for economic losses.[13] This Court

[4] See *Rafferty v Markovitz*, 461 Mich 265, 270-271; 602 NW2d 367 (1999).

[5] See *Veselenak v Smith*, 414 Mich 567, 573-574, 576; 327 NW2d 261 (1982).

[6] *Kewin v Massachusetts Mut Life Ins Co*, 409 Mich 401, 419; 295 NW2d 50 (1980), quoting *McFadden v Tate*, 350 Mich 84, 89; 85 NW2d 181 (1957).

[7] *Kewin*, *supra* at 419, citing *Ten Hopen v Walker*, 96 Mich 236, 240; 55 NW 657 (1893); *McChesney v Wilson*, 132 Mich 252, 258; 93 NW 627 (1903).

[8] *Joba Construction Co, Inc v Burns & Roe, Inc*, 121 Mich App 615; 329 NW2d 760 (1982).

[9] *Id*. at 642.

[10] *Id*. at 643.

[11] *Hayes-Albion Corp v Kuberski*, 108 Mich App 642; 311 NW2d 122 (1981).

[12] See *Hayes-Albion Corp v Kuberski*, 421 Mich 170; 364 NW2d 609 (1984).

[13] See *id*. at 187-188.

has also held that "exemplary damages will not be awarded to compensate a purely pecuniary grievance susceptible to full and definite monetary compensation."[14]

As a result, although a corporation may still recover exemplary damages for such damages as injuries to its reputation, the portion of *Joba*'s holding respecting recoverability of lost profits as exemplary damages appears to be no longer viable. We reach this conclusion because, while it may be the case that lost profits are "inherently incapable of precise measurement,"[15] they may nonetheless be properly recovered as compensatory damages as long as they are proved with a reasonable degree of certainty.[16]

In this case, although Technology offered no evidence of damages resulting from injury to its reputation, it presented extensive expert testimony respecting the amount of its lost profits, and the jury's $1.9 million exemplary damage award closely approximates the amount of lost profits to which the expert testified. As Woodward-Manchester argues, the only way this award could be supported as exemplary damages is if the jury was improperly considering the evidence concerning Technology's lost profits. Technology's argument essentially acknowledges this point. Therefore, because Technology offered proof of its lost profits with reasonable certainty, and offered no proof of such damages as injury to its reputation, its losses constituted "a purely pecuniary grievance susceptible to full and definite monetary compensation,"[17] and the exemplary damage award was inappropriate.[18] Because we agree in part with Technology's position on cross-appeal, as explained below, we reverse the order reinstating the jury's verdict and remand for a new trial on the issue of damages. In light of our conclusion, we need not address Woodward-Manchester's remaining arguments.

III. Cross-Appeal

A. Standard Of Review

As noted, whether the trial court erred in determining the proper measure of Technology's damages is a question of law, and is therefore reviewed de novo.[19]

B. Conversion

In a conversion action, the proper measure of damages is the fair market value of the item converted at the time of the conversion.[20] However, if the converted property "does not have a

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[14] See *Jackson Printing Co v Mitan*, 169 Mich App 334, 341; 425 NW2d 791 (1988).

[15] *Joba, supra* at 642.

[16] *Body Rustproofing, Inc v Michigan Bell Tel Co*, 149 Mich App 385, 390; 385 NW2d 797 (1986).

[17] *Id*.

[18] *Id*.

[19] *Burt Twp, supra* at 662-663.

[20] *Bernhardt v Ingham Reg'l Med Ctr*, 249 Mich App 274, 280-281; 641 NW2d 868 (2002), citing *Larson v VanHorn*, 110 Mich App 369, 385; 313 NW2d 288 (1981).

regular market value, the measure of damages is the value of the property to the owner at the time of the conversion."[21]

The trial court determined that the value of the equipment was the amount Technology had paid Ford, specifically, eight cents a pound. Technology argues that the equipment's value should have been calculated using the *total* amount it agreed to pay Ford under the contract – that is, eight cents a pound plus eighteen percent of the profit when the equipment was sold. However, Technology's proposal does not comport with the rule that the value of the equipment must be determined *at the time of the conversion*;[22] that is, before it had been processed for resale. Because the equipment had not yet been sold, the trial court correctly determined that the equipment's value at the time of the conversion should not include eighteen percent of the expected profit from resale. Furthermore, because the equipment had not yet been prepared for resale, the trial court properly rejected Technology's suggestion that the equipment had a market value that exceeded the eight cents a pound Technology had already paid.

C. Lost Profits

Technology also argues that the trial court erred in denying it the opportunity to recover lost profits. We agree. Although there appears to be a split of authority respecting whether lost profits are available in a conversion action,[23] it is clear that lost profits may be recovered in a negligence action.[24] if they are "proven with a reasonable degree of certainty as opposed to being based on mere conjecture or speculation."[25] In this case, the jury found Woodward-Manchester liable for gross negligence[26] as well as conversion, which means that Technology was undoubtedly entitled to recover its lost profits on its negligence claims if it proved such lost profits with reasonable certainty.

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[21] *Ehman v Libralter Plastics, Inc*, 207 Mich App 43, 45; 523 NW2d 639 (1994), citing *Barbrick v White Sewing Machine Co*, 180 Mich 535; 147 NW 493 (1914).

[22] See *Ehman*, *supra* at 45.

[23] Compare *Ehman*, supra at 44-45 (lost profits properly denied in conversion action because it was "inconsistent with the theory of a forced sale") with *Central Transport, Inc v Fruehauf Corp*, 139 Mich App 536, 545; 362 NW2d 823 (1984) ("An injured party may recover incidental damages arising from a conversion").

[24] See *Couyoumjian v Brimage*, 322 Mich 191, 33 NW2d 755 (1948) (lost profits properly awarded where the defendant landlords negligently set fire to the plaintiff's store).

[25] *Body Rustproofing, Inc v Michigan Bell Tel Co*, 149 Mich App 385, 390; 385 NW2d 797 (1986), citing *Allen v Michigan Bell Tel Co*, 61 Mich App 62, 68-69; 232 NW2d 302 (1975) and *The Vogue v Shopping Centers, Inc*, 58 Mich App 421; 228 NW2d 403 (1975).

[26] Although Technology presented its claim to the jury as one for gross negligence and argues on appeal that lost profits are awardable for gross negligence, it appears that presenting the claim as one for gross negligence rather than ordinary negligence was a matter of trial strategy intended to persuade the jury to award exemplary damages. A showing of gross negligence is not required to support a claim for lost profits. Lost profits may be awarded in actions for ordinary negligence. What is critical is not whether the profits lost are the product of gross as opposed to ordinary negligence, but rather whether the claim of lost profits is established with a reasonable degree of certainty.

Having reviewed the record, we are convinced that Technology presented sufficient evidence of lost profits to present the issue to the jury. Technology presented expert testimony that its total damages were $2,478,862, including $2,430,053 in lost revenue and $48,809 in lost operating assets, based on Drummond's estimate that 1.3 million pounds of equipment had been lost. Expert testimony further indicated that Technology realized $6.03 in revenue for every pound of equipment in 1995, and $6.74 per pound in 1996. These past profits could be used as a measure of future profits, as long as "all the various contingencies by which such profits would probably be affected should be taken into account by the jury and allowed such weight as the jury, in the exercise of good sense and sound discretion, believes they are entitled to."[27]

Woodward-Manchester argues that, because the quality and quantity of the damaged equipment could not be established, the amount of lost profits would have been purely speculative. We disagree. There is a critical distinction between the fact question whether Technology would have enjoyed a profit but for Woodward-Manchester's negligence and the fact question relating to the quantity of equipment damaged as a result of Woodward-Manchester's negligence. As to the first point, as more fully described above, Technology had a sufficient track record of profits to allow a jury to consider whether it was reasonably certain that Technology would have produced a profit in the absence of Woodward-Manchester's wrongful conduct. As to the latter point, the jury will be required to determine the amount of equipment damaged or destroyed by Woodward-Manchester in order for the jury to determine Technology's actual damages excluding lost profits. We see no reason to preclude the jury from utilizing its finding on this point to assist it in the calculation of lost profits. [The] law does not require impossibilities' and does not require a higher degree of certainty than the nature of the case permits."[28] Accordingly, "when the nature of a case permits only an estimation of damages or a part of the damages with certainty, it is proper to place before the jury all the facts and circumstances which have a tendency to show their probable amount."[29] Further, this Court has made clear that "[m]athematical precision in the assessment of damages is not required where, from the very nature of the circumstances, precision is unattainable, particularly where the defendant's own act causes the imprecision."[30] In this case, testimony indicated that Woodward-Manchester damaged Technology's records as well as its equipment. Accordingly, Technology's lack of complete records should not bar its recovery of lost profits.

Woodward-Manchester also argues that Technology's expert used flawed methods to determine its lost profits. However, the jury heard testimony to this effect from Woodward-Manchester's own expert, and it was the jury's role to weigh the relative credibility of the experts' testimony.[31] Once sufficient evidence was provided to make a determination, the

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[27] *Body Rustproofing, Inc*, *supra* at 390, citing *Allison v Chandler*, 11 Mich 542, 560 (1863).

[28] *Body Rustproofing, Inc*, *supra* at 390, quoting *Allison*, *supra* at 554; *Muskegon Agency, Inc v General Telephone Co of Michigan*, 350 Mich 41, 50-51; 85 NW2d 170 (1957).

[29] *Body Rustproofing, Inc*, *supra* at 391, citing *Allison*, *supra* at 554-555.

[30] *Willis v Ed Hudson Towing, Inc*, 109 Mich App 344, 350; 311 NW2d 776 (1981).

[31] *Detroit v Larned Associates*, 199 Mich App 36, 41; 501 NW2d 189 (1993).

measure of damages for lost profits was properly left to "the sound judgment of the trier of fact . . . ."[32]

Although new trials limited to the issue of damages are disfavored,[33] they are permitted in cases when, as here, liability is clear.[34] Accordingly, we remand for a new trial on the damage issue only.

Reversed and remanded for a new trial limited to the issue of damages. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ E. Thomas Fitzgerald
/s/ Brian K. Zahra

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[32] *Henry v City of Detroit*, 234 Mich App 405, 415; 594 NW2d 107 (1999), citing *Vink v House*, 336 Mich 292, 297; 57 NW2d 887 (1953).

[33] See *Garrigan v LaSalle Coca-Cola Bottling Co*, 373 Mich 485, 489; 129 NW2d 897 (1961).

[34] See *Bias v Ausbury*, 369 Mich 378, 383; 120 NW2d 233 (1963).